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04 UNITED STATES DISTRICT COURT  
05 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

06 MICHAEL DUANE BENJAMIN, ) CASE NO.: C06-0759-RSM  
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08 Petitioner, )  
09 )  
10 v. ) REPORT AND RECOMMENDATION  
11 )  
12 STATE OF WASHINGTON, )  
13 )  
14 Respondent. )  
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12 Petitioner is a federal prisoner who has filed *pro se* a “petition for a writ of error coram  
13 nobis.” He claims in the petition that in 2003, before he commenced his current federal sentence,  
14 he was sentenced by a state trial court to 22 months’ imprisonment after pleading guilty to second  
15 degree theft. (Petition at 1-2). Petitioner contends that the sentencing court directed that the state  
16 sentence be served concurrently with any other sentence that might be imposed. However,  
17 petitioner apparently finished serving the state sentence in April 2004, whereupon he was released  
18 to federal authorities pursuant to a federal detainer. (Petition, Ex. B at 1). Some time after that,  
19 petitioner began serving his current federal sentence. Thus, petitioner argues, his state sentence  
20 was not served concurrently, but rather consecutively, to the federal sentence. Petitioner claims  
21 a constitutional violation has thereby occurred, and seeks to vacate the state conviction. (Petition  
22 at 9).

01       The petition has not been served on respondent and for the reasons set forth below, the  
02 court recommends that it be summarily dismissed. *See* Rule 4 of the Rules Governing Section  
03 2254 Cases in the United States District Courts. (“If it plainly appears from the petition and any  
04 attached exhibits that the petitioner is not entitled to relief in the district court, the judge must  
05 dismiss the petition . . .”). First, petitioner has previously raised this claim regarding his state  
06 sentence in this court, through a petition for a writ of habeas corpus under 28 U.S.C. § 2241. *See*  
07 *Benjamin v. Compton*, Case No. C05-1630-TSZ-JPD. The court denied that petition, based upon  
08 a Report and Recommendation (“R&R”) issued by the Honorable James P. Donohue, United  
09 States Magistrate Judge. (Doc. #5 in Case No. C05-1630). In his R&R, Judge Donohue  
10 recommended dismissal because (1) the petitioner was no longer in custody pursuant to the state  
11 court judgment under attack; (2) it did not appear that petitioner’s federal sentence had been  
12 enhanced due to the state court sentence; and (3) even if it had been enhanced, the proper place  
13 to challenge the enhanced sentence would be in the federal district where the federal sentence was  
14 imposed, which appeared to be the District of Idaho. (*Id.* at 2-3).

15       The District Court, Thomas S. Zilly, agreed with Judge Donohue’s recommendation and  
16 dismissed the case. (Doc. #9 in Case No. C05-1630). Petitioner is currently appealing that  
17 decision to the Ninth Circuit Court of Appeals. (Doc. #14). Although Judge Zilly denied  
18 petitioner’s request for a certificate of appealability (Doc. #15), his appeal could still proceed if  
19 the Ninth Circuit grants his request. *See* Fed. R. App. P. 22(b). Because the issue raised by  
20 petitioner in the instant petition for a writ of error coram nobis is duplicative of his earlier petition,  
21 and because that petition is pending before the Ninth Circuit, the petition here should be dismissed.  
22 *See United States v. Deeb*, 944 F.2d 545, 548 (9th Cir. 1991).

01 In addition, a petition for a writ of error coram nobis does not appear to be the proper  
02 vehicle for petitioner's claim. The Supreme Court has held that coram nobis jurisdiction exists  
03 only "in those cases where the errors were of the most fundamental character, that is, such as  
04 rendered the proceeding itself irregular and invalid." *United States v. Mayer*, 235 U.S. 55, 69  
05 (1914). Petitioner does not allege that the sentencing proceeding in state court was either  
06 irregular or invalid. Finally, there is nothing in the record that demonstrates that any other  
07 sentence – federal or otherwise – existed at the time petitioner was sentenced by the state court.  
08 Therefore, there was no other sentence with which his 22-month sentence *could* have run  
09 concurrently. Accordingly, even if petitioner's claim were properly before this court, it appears  
10 to lack merit.

11 For the foregoing reasons, the court recommends that petitioner's petition for a writ of  
12 error coram nobis be dismissed. A proposed order accompanies this Report and  
13 Recommendation.

14 DATED this 27th day of June, 2006.

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16 Mary Alice Theiler  
17 United States Magistrate Judge  
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